

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

TONY L. MUTSCHLER,

Petitioner,

v.

THOMAS MCGINEY, *et al.*,

Respondents.

No. 4:17-CV-02235

(Judge Brann)

(Magistrate Judge Carlson)

**ORDER**

**MAY 7, 2019**

Tony L. Mutschler filed this 28 U.S.C. § 2254 petition seeking to vacate his state conviction and sentence.<sup>1</sup> On March 13, 2019, Magistrate Judge Martin C. Carlson issued a Report and Recommendation recommending that this Court deny Mutschler’s petition as time-barred.<sup>2</sup> No timely objections were filed to this Report and Recommendation.

Where no objection is made to a report and recommendation, this Court will review the recommendation only for clear error.<sup>3</sup> Conversely, “[i]f a party objects timely to a magistrate judge’s report and recommendation, the district court must

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<sup>1</sup> Docs. 1, 4.

<sup>2</sup> Doc. 30.

<sup>3</sup> Fed. R. Civ. P. 72(b), advisory committee notes; *see Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987) (explaining that court should in some manner review recommendations regardless of whether objections were filed).

‘make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.’”<sup>4</sup> Regardless of whether timely objections are made, district courts may accept, reject, or modify—in whole or in part—the findings or recommendations made by the magistrate judge.<sup>5</sup> Upon de novo review<sup>6</sup> of the Report and Recommendation, this Court finds no error in Magistrate Judge Carlson’s conclusion that Mutschler’s petition is time-barred.<sup>7</sup> Consequently, **IT IS HEREBY ORDERED** that:

1. Magistrate Judge Martin C. Carlson’s Report and Recommendation (Doc. 30) is **ADOPTED**;
2. Mutschler’s 28 U.S.C. § 2254 petition (Doc. 1) is **DISMISSED**;
3. A certificate of appealability shall not issue; and

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<sup>4</sup> *Equal Emp’t Opportunity Comm’n v. City of Long Branch*, 866 F.3d 93, 99 (3d Cir. 2017) (quoting 28 U.S.C. § 636(b)(1)).

<sup>5</sup> 28 U.S.C. § 636(b)(1); Local Rule 72.31.

<sup>6</sup> In a separate matter, on April 11, 2019, Mutschler notified the Court that he was in transit and unable to mail any documents. *Mutschler v. Tritt*, 3:14-cv-02477. This occurred after objections were due in this matter and should not have impacted Mutschler’s ability to file timely objections. Nevertheless, out of an abundance of caution, this Court will review the Report and Recommendation de novo.

<sup>7</sup> The Court notes that Mutschler previously filed a § 2254 petition that was dismissed as untimely. *Mutschler v. Tritt*, 3:15-cv-00472, 2015 WL 3953183 (M.D. Pa. June 29, 2015). That dismissal operated as an adjudication on the merits, and Mutschler is barred from filing another § 2254 petition without authorization from the United States Court of Appeals for the Third Circuit. *Rohn v. Horton*, 508 F. App’x 170, 171 (3d Cir. 2013). Mutschler did not obtain leave from the Third Circuit to file this § 2254 petition and, for that additional reason, this Court lacks jurisdiction to consider Mutschler’s petition. *Id.*

4. The Clerk of Court is directed to **CLOSE** this case.

BY THE COURT:

*s/ Matthew W. Brann*

Matthew W. Brann

United States District Judge